Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1977

No. 77-173

MICHAEL ALBERT MOONE,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MICHAEL ALBERT MOONE,

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

MICHAEL ALBERT MOONE, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 30, 1977.

## OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is printed and set forth as Appendix A hereto (Appendix pp. 1 & 2). The journal entry of judgment of the United States District Court for the Central District of California is set forth as Appendix B hereto (Appendix p. 3). The journal entry of the District Court's ruling denying motion to controvert and quash search and suppress evidence is set forth as Appendix C hereto (Appendix pp. 3 & 4).

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix pp. 1 & 2) was entered on June 30, 1977. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

**Whether a warrantless search and seizure, not incident to a lawful arrest, of two securely tied bags belonging to the petitioner and left, temporarily, outside the petitioner's business is an intolerable intrusion upon the petitioner's constitutionally protected privacy, when the seizure was not subject to a delineated exception to the provisions of the Fourth Amendment, and when the search and seizure illegally intruded upon the curtilage of the petitioner's business.**



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**United States Constitution, Fourth Amendment:**

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized."

## STATEMENT OF THE CASE

Petitioner, MICHAEL ALBERT MOONE, was originally charged with a one-count indictment alleging a violation of 21 U.S.C. §§ 841(a)(1) and 846–attempt to manufacture amphetamine, a Schedule II controlled substance. Petitioner MOONE pled not guilty and a jury trial was set.

Prior to trial, a four-count first superseding indictment was filed alleging a violation of 21 U.S.C. §§ 841(a)(1) and 846–possession with intent to distribute a controlled substance; distribution of a controlled substance; manufacture of a controlled substance; and attempt to manufacture a controlled substance.

## STATEMENT OF THE FACTS

Petitioner MOONE was the sole proprietor, doing business as Consulting Engineers in January of 1976, at

1225 E. Orangethorpe Avenue in the City of Fullerton, California.

The petitioner has an educational background in chemistry, having received a Bachelor of Science Degree in that subject in 1965 from the University of California at Los Angeles, and has audited five graduate courses in the fields of advanced organic principles and pharmacology.

During the months from November 1975 to January 1976, MICHAEL B. McGLONE, a special agent in the Drug Enforcement Administration, United States Department of Justice, engaged in investigation and surveillance of petitioner, MICHAEL ALBERT MOONE, pursuant to business activities in and about his commercial premises at 1225 E. Orangethorpe Avenue, Fullerton, California.

Such surveillance was a result of information received from Givaudan Chemical Company in Clinton, New Jersey, regarding the order of 100 pounds of phenyl acetic acid that would be shipped to Fullerton, California.

Investigator McGLONE was also informed that on December 23, 1975, petitioner appeared in person at Givaudan Chemical Company and purchased, by postal money order, a 100-pound order of phenyl acetic acid.

Petitioner informed an employee that he was using the chemical for epoxy resins in the coating of race cars, motorcycles and fiberglass.

Between the time period of November 3, 1975 and January 14, 1976, investigator McGLONE personally conducted physical surveillance of petitioner MOONE's business location at 1225 E. Orangethorpe Avenue, Fullerton, California.

Surveillance of Mr. MOONE's activities was occasionally accomplished by traveling up a side street to other commercial



businesses and viewing petitioner's business premises from the rear. Access to petitioner's rear premises could only be achieved by proceeding directly through petitioner's business or by traveling up the side street, known as Pepper Place, and which has been designated as private property. Signs posted in the rear of the commercial complex of which Mr. MOONE's business is a part indicated that parking was for tenants only, and on occasion non-tenant automobiles have been towed away and cited for illegal parking.

Petitioner MOONE was in the process of moving his business from the Fullerton, California address to a new location in North Hollywood during the first week of January 1976. During this cleaning-up process, Mr. MOONE had occasion to use plastic trash bags for the chemicals that were broken or spilled on the floor. Utilization of said plastic trash bags was, among other things, for the discarding of poisonous materials.

On January 20, 1976, the petitioner, during his cleaning process, placed these trash bags outside, due to the heavy odor of ammonia from within the contents of the bags. Petitioner MOONE had not completed his cleaning-up process and expected the trash bags to be returned inside the business premises to be used at a later date.

However, *the trash bags remained outside, and on the night of January 20, 1976, at 9:30 p.m., investigator McGLONE proceeded to the rear of Mr. MOONE's business premises in Fullerton, California, and then seized the bags.* A chemical analysis was performed on the items seized, and *a positive reaction for amphetamine was found.* The trash bags in question that were seized by investigator McGLONE were opaque and were securely affixed with twist-on wires.

A Dewey dumpster was located approximately five feet from petitioner's rear entrance of his business, and investigator McGLONE seized the trash bags which were located between the area of the rear entrance and the dumpster.

Mr. MOONE utilized the Dewey dumpster behind the commercial premises for the discarding of various debris.

As a result of the residue found in the trash bags and Mr. MOONE's activities in connection with his business, a search warrant was issued for Mr. MOONE's North Hollywood business premises located at 7059½ Vineland Avenue.

The search warrant was carried out at approximately 1:00 a.m. on January 26, 1976, in which various chemicals and apparatus were observed and seized by Drug Enforcement Administration Agents.

## RULINGS BELOW

Mr. MOONE was held to answer and pled not guilty to each and every one of the four counts alleged against him. Subsequent thereto, a hearing of the petitioner's motion to controvert and quash the search and to suppress evidence and for return of property seized was had in the United States District Court for the Central District of California. After the introduction of evidence and argument, the District Court denied the motion (see Appendix C, Appendix pp. 3 & 4). Subsequent to the denial of the motion, a trial by jury was waived by the petitioner and the waiver accepted by the court. Thereafter, the court found MICHAEL ALBERT MOONE guilty on all four counts (see Appendix B, Appendix



p. 3).

The Ninth Circuit Court of Appeals ruled that Mr. MOONE had abandoned the plastic bags left outside his business. The court determined that when a person places trash in a public trash container, he has abandoned it and may not claim the protection of the Fourth Amendment. Furthermore, according to the court, whether the trash is placed inside or next to a trash container is irrelevant. Therefore, the Court of Appeals affirmed the conviction by the District Court.

## REASONS FOR GRANTING THE WRIT

The issue in this case is not nearly so simplistic as implied by the Court of Appeals in its brief opinion affirming the conviction of MICHAEL ALBERT MOONE. The court stated simply that the two bags seized by the government's special agents were abandoned as trash, and that once abandoned, the bags were no longer protected by the Fourth Amendment (see Appendix p. 2). According to the court:

> "The mere fact that Moone placed the bulky cardboard box alongside the dumpster rather than inside it does not alter the essential nature of the act." (Appendix p. 2.)

However, by dismissing the placement of the bags, the Court of Appeals missed the petitioner's basic contention. In fact, Mr. MOONE accepts the idea that once property has been abandoned it loses its Fourth Amendment protection. It is, however, the petitioner's contention that the reasonable expectation of privacy, the same expectation

that protects the curtilage of a person's residence from unlawful search and seizure, is equally applicable to a person's business. By placing the two securely tied plastic bags just outside his business door and not inside or immediately next to the trash dumpster, petitioner MOONE had a reasonable expectation of privacy–that the bags were in the curtilage of his business building and, therefore, remained protected by the Fourth Amendment.

In fact, this Court has determined that, for purposes of the Fourth Amendment, residences and businesses are equally protected. In *See v. City of Seattle,* 387 U.S. 541, at 543, the Court stated:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private property."

Furthermore, in *Wattenberg v. United States,* 388 F.2d 853 (9th Cir. 1968), it was emphasized that the protection afforded by the Fourth Amendment insofar as houses were concerned is not restricted to the interior of the house but extends to open areas immediately adjacent thereto. This is the classic Fourth Amendment protection afforded the curtilage of a residence, and the protection Mr. MOONE contends is also afforded his business.

The government claimed in its argument below that the concept of curtilage is no longer a viable concept with regard to the Fourth Amendment. As supporting authority, the respondent referred to the Ninth Circuit case of *United States v. Magana,* 512 F.2d 1169, 1170 - 1171 (9th Cir. 1975), in which it was said, " 'a reasonable expectation of privacy' and not common law property distinctions now



controls the scope of the Fourth Amendment." [*Accord: United States v. Richard Lee Freie*, 545 F.2d 1217 (9th Cir. 1976).] *However,* this distinction does no injury to the petitioner's contention; in fact, it reinforces his case. The traditional concept of curtilage is drawn from common law property and, traditionally, was applied to residential buildings (see *Ballantine's Law Dictionary,* Third Edition, p. 300). It has since been applied in Constitutional Law to determine the space around a residence protected from unreasonable search and seizure by the Fourth Amendment–the same protection Mr. MOONE contends applies to a business. However, many lower courts, wrongly we think, have denied that businesses have a protected curtilage merely because the concept was rooted in common law property applied to residences [see *United States v. Hayden,* 140 F. Supp. 429 (D.C. Md. 1956); *United States v. Vlahos,* 19 F. Supp. 166, 170 (D.C. Or. 1939)]. Although Mr. MOONE still contends that the concept of curtilage does apply to businesses, the concept of "a reasonable expectation of privacy" (as used in *United States v. Magana, supra,* 512 F.2d 1169) does no harm to the concept of curtilage as to the protection afforded by the Fourth Amendment, and is a much more workable concept since it is not rooted in common law property dealing with residential homes. Without such traditional roadblocks, the concept can be applied to any private area without the problem of differentiating home from business. Moreover, since, as earlier explained, businesses and residences enjoy equal protection under the Fourth Amendment (*See v. City of Seattle, supra,* 387 U.S. 541), the concept of a reasonable expectation of privacy as applied to homes would also be applicable to

businesses.

Clearly, as the facts are explained in this case, Mr. MOONE, by placing his bags next to his door, securely sealed and with full intent to return the bags to the interior of his business, had a reasonable expectation that the privacy of his bags was secure and protected by the Fourth Amendment.

If the Court accepts the premise that there exists an area around and near a business where the proprietor has a reasonable expectancy of privacy, the same as the curtilage of a residence, then the facts and law surrounding this case make it obvious that Mr. MOONE's bags were protected. As mentioned above, the bags were securely tied and left just outside the business door. The bags may have been visible from the street, but since they were closed and the contents not visible, the government's special agents had no evidence or reason to assume the bags contained incriminating evidence, nor any right to seize them. Mr. MOONE did not intend to dispose of the bags, as he could have easily placed them in the dumpster if such was his intent. Clearly, Mr. MOONE handled the bags feeling he had a reasonable expectation that the bags were protected.

Confusion, however, has arisen in the lower courts because of the apparent differences in opinion on the proper method of resolution. First, there are the federal courts which still recognize curtilage as applicable only to residences (*United States v. Hayden, supra,* 140 F. Supp. 429; *United States v. Vlahos, supra,* 19 F. Supp. 166). Then there is the Ninth Circuit which has moved away from the concept of curtilage to the idea of expectancy of privacy (*United States v. Magana, supra,* 512 F.2d 1169). Finally,



the courts have further muddied the waters by delving into a course of factual nit-picking to determine if the property was abandoned (*United States v. Mustone,* 469 F.2d 970 (1st Cir. 1972), bags near garbage cans several doors away were abandoned; *Magda v. Benson,* 536 F.2d 111 (6th Cir. 1976), garbage bags placed mingled with other bags near apartment complex trash area were abandoned). The California Supreme Court has abandoned such nit-picking in *People v. Krivda,* 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), *modified,* 8 Cal. 3d 623, 105 Cal. Rptr. 521 (1973), *cert. denied,* 412 U.S. 919, 37 L. Ed. 2d 145, 93 S. Ct. 2734 (1973). In that case it was noted that even when bags were placed in trash cans on a public street, there was not necessarily an abandonment. Since the contraband was not visible and was in bags, it appeared, according to California's highest court, that the "defendant exhibited an expectancy of privacy." (*Id.* at p. 366.)

This confusion, then, between the District Courts and Courts of Appeals, and even among the Courts of Appeals, and between federal and state courts, presents a lack of uniformity, which can be corrected only by the United States Supreme Court. Finally, since the Supreme Court pronounced that businesses are equally protected as residences (*See v. City of Seattle, supra,* 387 U.S. 541), this Court has not squarely faced a question similar to the case at bar. The resultant myriad of Court of Appeals decisions about the protection accorded businesses has left confusion in the lower courts regarding this important issue, which can be eliminated only by a pronouncement by this Honorable Court.

## CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER M. CALLAHAN

*Counsel for Petitioner*

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## APPENDIX A

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### MEMORANDUM
### Of Affirmance

In the United States Court of Appeals for the Ninth Circuit.

No. 76-3033.

UNITED STATES OF AMERICA, Appellee, vs. MICHAEL ALBERT MOONE, Appellant.

[Filed June 30, 1977]

Appeal from the United States District Court
for the Central District of California

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Before: ELY, GOODWIN, and WALLACE, Circuit Judges.

Moone was convicted of the possession, manufacture, and attempted manufacture of amphetamines in violation of 21 U.S.C. §§ 841(a) and 846. The cause was tried to the court after the denial of Moone's pre-trial motions to suppress evidence. The sole issue on appeal relates to the admission of certain evidence.

Moone had placed a cardboard box containing two large plastic trash bags alongside a "Dewey dumpster" about five feet behind his business premises. The dumpster was located in the back parking lot of the premises in an area open to the public. Agents of the Drug Enforcement Administration seized the trash bags, and they were found to contain evidence of amphetamines. Based upon this information and other factors, the Government's agents

obtained a search warrant authorizing the search of Moone's business premises. The search produced incriminating evidence. The District Court held that Moone had abandoned the trash bags and that he therefore had no standing to complain of the seizure. We affirm.

The federal courts are unanimous in holding that when a person places trash in a public trash container, he has abandoned it and may not claim the protection of the Fourth Amendment. In *United States v. Jackson*, 448 F.2d 963 (9th Cir.), *cert. denied*, 405 U.S. 924 (1971), we wrote:

> "What a person knowingly exposes to the public is not a subject of Fourth Amendment protection. Katz v. United States, 389 U.S. 347, 351 (1967). When defendants placed articles in this public trash can outside the room, they surrendered their privacy with regard to those articles. *See* United States v. Minker, 312 F.2d 632, 634 (3rd Cir. 1962)." Id. at 971.

*See also Magda v. Benson*, 536 F.2d 111 (6th Cir. 1976); *United States v. Mustone*, 469 F.2d 970 (1st Cir. 1972); *United States v. Dzialak*, 441 F.2d 212 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971).[1]

The mere fact that Moone placed the bulky cardboard box alongside the dumpster rather than inside it does not alter the essential nature of the act. Abundant evidence supported the District Court's finding of abandonment.

AFFIRMED

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[1]Our own precedents make it clear that we have rejected the approach taken by California in *California v. Krivda*, 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), *remanded*, 409 U.S. 33 (1972), *reheard*, 8 Cal. 3d 623, 105 Cal. Rptr. 521, 504 P.2d 457 (1973), *cert. denied*, 412 U.S. 919 (1973). *Jackson, supra. See also Magda v. Benson, supra* at 113.



## APPENDIX B

### JOURNAL ENTRY OF JUDGMENT

In the United States District Court for the Central District of California.

No. DC-CR-76-208-MML.

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL ALBERT MOONE, Defendant.

[July 16, 1976]

"MIN ORD: C/T (7th Day), Court finds Defendant GUILTY on all four counts. Referred to Probation Officer for I&R and case continued to 8-23-76 at 1:30 PM. Order Defendant remain on present bond."

## APPENDIX C

### JOURNAL ENTRY OF RULING DENYING MOTION TO CONTROVERT AND QUASH SEARCH AND SUPPRESS EVIDENCE.

In the United States District Court for the Central District of California.

No. DC-CR-76-208-MML.

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL ALBERT MOONE, Defendant.

[April 30, 1976]

"The Court rules the Defendant had abandoned the trash bags and their

search and seizure was lawful."

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STATE OF CALIFORNIA )
) SS.
County of Orange )

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JULY 28 1977, I served the within PETITION FOR A WRIT OF CERTIORARI (in the matter of MICHAEL ALBERT MOONE vs. UNITED STATES OF AMERICA) on the followng named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL of the UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530 [3 copies]

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR
U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012 [2 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY 28th 1977, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

**Dean-Standefer, 326½ Main St., Huntington Beach, Ca.**
**(714) 536-7161**